Supreme Court, U. S.
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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1976

No. 76-984

ROBERT GEORGE DRUMMOND and MILDRED PAULINE DRUMMOND,

Petitioners,

vs.

FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF GEORGIA, DIVISION OF FAMILY AND CHILDREN'S SERVICES

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioners, Robert George Drummond and Mildred Pauline Drummond, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on September 7, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia affirming the decision of the Superior Court for Fulton County,

Georgia, is reported at 237 Ga. 449, __ SE2d __(1976) and is appended hereto at 1-A. The findings of fact and conclusions of law entered by the Superior Court for Fulton County, Georgia, are appended hereto beginning 14-A and 17-A. The order denying rehearing is appended hereto beginning at 29-A.

JURISDICTION

The opinion of the Supreme Court of Georgia was entered on September 7, 1975. This Court has jurisdiction pursuant to 28 U.S.C. §§1257(3), 2101(c) and Rule 22.3, Revised Rules of the Supreme Court of the United States. On November 30, 1976, Mr. Justice Powell entered an order extending the time for filing a petition for certiorari in this case to and including January 15, 1977.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONERS, WHO ARE CAUCASIAN AND WHO ALLEGE A DENIAL OF EQUAL PROTECTION BECAUSE OF RACIAL DISCRIMINATION, HAVE STANDING TO CHALLENGE RESPONDENTS' REFUSAL TO CONSENT TO PETITIONERS' ADOPTION OF A RACIALLY MIXED CHILD.

II. WHETHER PETITIONERS, WHO WERE FOSTER PARENTS TO A CHILD FROM AGE ONE MONTH UNTIL TWO AND ONE-HALF YEARS, HAVE ANY RIGHTS GUARANTEED

BY THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT WHEN A DECISION IS MADE TO REMOVE THAT CHILD FROM PETITIONERS' HOME (HIS PSYCHOLOGICAL PARENTS) AND PLACE HIM ELSEWHERE FOR ADOPTION.

III. WHETHER A STATE MAY TERMINATE NATURAL PARENTAL RIGHTS AND INVEST IN A STATE AGENCY "ABSOLUTE DISCRETION" OVER THE WELFARE OF A CHILD SUCH THAT NO ONE, INCLUDING FOSTER PARENTS OR THE CHILD HIMSELF IF HE BE UNDER THE AGE OF FOURTEEN YEARS, HAS STANDING TO CONTEST THE DECISIONS OF THE AGENCY.

IV. WHETHER THE CHILD WAS ENTITLED TO THE APPOINTMENT OF A GUARDIAN AD LITEM TO REPRESENT HIS INTERESTS AND TO ASSERT HIS RIGHT TO A PRE-REMOVAL HEARING (AND OTHER DUE PROCESS RIGHTS) FROM HIS ONLY KNOWN "PARENTS", HIS FOSTER PARENTS OF TWO AND ONE-HALF YEARS.

V. WHETHER THE CHILD, WHO IS RACIALLY MIXED, WAS DENIED EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN THE DEFENDANTS DECIDED HE SHOULD BE PLACED IN A BLACK ADOPTIVE HOME AND REFUSED TO CONSENT TO HIS ADOPTION BY HIS WHITE FOSTER PARENTS OF TWO AND ONE-HALF YEARS.

STATEMENT OF THE CASE

Petitioners, Robert George Drummond and Mildred Pauline Drummond, are husband and wife and had the care of Timothy (Timmy) Lee Hill from December, 1973 until May, 1976. The child was placed with the Drummonds as a foster child by the Fulton County Department of Family and Childrens Services (hereinafter DFACS). Timmy is a child with olive skin, brown eyes and brown curly hair. His mother is Caucasian, the identity of his father has not been established but it is believed that he is black. Timmy was 28 days old at the time of placement in the Drummond home. Petitioners after about six months sought to adopt Timmy but as early as March 1, 1975, they were told by defendants supervisors that he would "make a better adjustment and have a better life with a black couple in a black community." (T. 334-45). In September of 1975, the parental rights of the natural mother of Timmy were terminated by court order and he became available for adoption. Petitioners again sought to adopt Timmy, however, after an agency "staffing"[1] in which the decision was made, petitioners were told the agency

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[1] The "staffing" consisted of 18 social workers only one of whom had ever visited the Drummond home. The foster home worker was excluded from the meeting because it was known she favored the adoption.

was seeking a black home for the child and that they thought the child would be better off in a black home. This decision was made even though the placement case worker recommended that Timmy be adopted by the Drummonds. The quality of care and stimulation given the child were admittedly excellent, however, the decision as reflected in the agency files was to seek a black home for Timmy. As set forth above, this decision was made at a "staffing" of case workers at which neither petitioners nor the child were present or were given an opportunity to be heard. The memorandum (Exhibit 15, R. 503) states:

> "Race - We discussed how Timmy would be effected by being reared in a totally white environment. It was brought out that in years past when sufficient black homes have not been available, some children considered legally black have been placed for adoption with white families. However, a great deal of opposition resulted from the black community and social work organizations who felt that a black child reared in a white environment would not be adequately prepared for his life experiences.
>
> At present, Timmy is so young that it is doubtful he is aware of his mixed heritage. However, after discussion the staff was convinced that if we left

him in his present environment we would be giving him problems he would not have if placed in a black home.

A vote was taken and it was a group decision that it would not be in Timmy's best interest to leave him in the Drummond home, and that we would begin immediately to look for an appropriate black adoptive home. Although this was a difficult decision it was felt that Timmy's long range best interest must be the focus." Ex. 15.

Apparently other factors were discussed at the staffing, e.g., age (Georgia law has no limitation but agency policy does; Mr. Drummond met those requirements and had he been single he would have qualified); health (some case workers presented Timmy's pediatrician's views of Mrs. Drummond's health; she had never been asked to verify her good health and had no idea it was under consideration); the community in which they lived (the Drummonds bought a new house in suburban Atlanta so as to have the room required by the agency; they were never told Douglas County was an "unacceptable" community and had no knowledge thereof until this case; the case worker from Douglas County who characterized the community in which they lived had never visited their home or community).

When respondents sought to remove the child from the Drummonds' home, the Drummonds sought a hearing before the state agency and were denied that forum. Because there was no hearing, the Drummonds did not learn of these adverse considerations and of course had no opportunity to refute them. They then instituted an action in federal district court for the northern district of Georgia. A temporary restraining order was issued and nine days later, at the hearing on plaintiff's motion for a preliminary injunction, the court advanced the trial of the merits to that hearing and the complaint was dismissed at the conclusion of plaintiffs' case. This decision is reported in Drummond v. Fulton County Department of Family and Childrens Services, 408 F.Supp. 382 (N.D.Ga. 1976)[2]

Following the dismissal of the complaint by the federal court, the Drummonds filed this litigation in the Superior Court of Fulton County, Georgia. The complaint alleged the refusal of defendants to hold a hearing

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[2] The district court denied a stay pending appeal and the court of appeals after an interim stay denied that motion on appeal. Drummond v. Fulton County Department of Family and Childrens Services, 532 F.2d 1001, (5th Cir. 1976). The appeal continues its course. Oral argument was held on November 4, 1976, and is awaiting decision.

on the decision to remove Timmy from their home was an unconstitutional denial of due process in paragraphs 1 and 11 of the complaint, as amended. The denial of equal protection of the laws was alleged in paragraphs 1 and 8 of the complaint, as amended. The equal protection issues were set forth at pages 34-39 of appellants brief. The due process issues as to petitioners and the child are discussed at pages 23-34 of appellants brief in the Supreme Court of Georgia.

The Superior Court granted a temporary restraining order and later dismissed the complaint at the conclusion of plaintiffs' case. The Superior Court found that the foster parents had no rights granted under the laws of Georgia to custody of a foster child or to adopt said child; that the Drummonds had not acquired statutorily required consent of the legal custodian of the child, i.e. the state agency, and that their petition to adopt the child was fatally defective for that reason, that plaintiffs had not proved that defendants acted capriciously, arbitrarily and in abuse of their discretion in withholding their consent for the Drummonds to adopt the child; that the defendants used no impermissible standards in consideration of the plaintiffs' request to adopt the child; and that there was no denial of due process of law or equal protection of law nor

of any other rights guaranteed to plaintiffs or the child under the Constitution of the United States or of the State of Georgia. 14-A - 16-A. The Superior Court did grant a stay restraining the defendants from proceeding with final adoption of the child. 32-A. The stay was continued pending tne disposition of this petition by the Supreme Court of the State of Georgia on October 1, 1976.

The Supreme Court of the State of Georgia affirmed the superior court holding that the plaintiffs lacked standing either to challenge the removal of the child from their home or the decision not to place the child with the Drummonds for adoption. The court held that the Drummonds had no rights under state law save the right to petition for adoption of a child. And under state law the Drummonds claim of any state rights by virtue of their status as foster parents was without merit.

> The trial court did not err, as alleged in Enumeration 3, in denying any legal rights to foster parents who have cared for a child for more than two years and are his psychological parents. 4-A.

The court ruled that the superior court was correct in holding that there was

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no denial of due process or equal protection under the fourteenth amendment because it had ruled that foster parents had no right to contest the agency's actions. 4-A. Concluding that property interests are defined by state law the Drummonds had no standing because "the agency's discretion as to which adoptive family will be chosen is absolute and the Drummonds have no rights beyond being considered." 5-A. The court tied its findings of lack of a property interest, lack of an expectation that they would be allowed to adopt the child and lack of any other right into the reason for the court's denial of the equal protection claim.

> We, thus, find no basis for due process protections in favor of the Drummonds, and the equal protection arguments must also fail for the same reasons. 6-A.

The court also decided the child[1] could not challenge the agency's action.

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[1] Petitioner's complaint in prayer (c) asked for the appointment of a guardian ad litem to represent the interests of the child. A separate motion was filed again requesting appointment of a guardian ad litem. The trial court orally ruled that no guardian was necessary because the court and the defendants could adequately represent the interests of Timmy. The Supreme Court of Georgia summarily denied this enumeration of error. 10-A.

We also find no merit in Enumeration 8 claiming that the trial court erred in not holding that Timmy's constitutional rights were infringed since Timmy has no right under the adoption statutes to chose his adoptive parents or consent to his adoption until the age of 14. Code Ann. §74-403. Furthermore, he was not a party to this lawsuit. 6A-7A.

The court also rejected the claim that the agency had arbitrarily withheld consent for the Drummonds to adopt the child. Under state law that entity having legal custody of a child must consent to any petition for adoption or the petition will be denied.

> The FCDFCS as legal guardian of Timmy stands in loco parentis and has all the legal rights of a natural parent, including the benefit of a prima facie right to custody. [citation of authorities omitted.] As is clear from Code Ann. §74-403, the agency also has the right to chose the adoptive parents of its wards by giving or refusing its consent to adopt....

> The Drummonds claim, however, that the consent of the FCDFCS was withheld unreasonably, was "arbitrary" and was "clearly an 'unwarranted exercise of discretion'." Since we have already held that the Drummonds have no right or standing to challenge the agency's action, the trial court properly dismissed this claim. 10A.

The majority opinion includes no recitation that the denial of equal protection was based on the Drummonds' claim that race was impermissibly considered in the agency's decision. A separate opinion by Justice Hill, concurring specially, stated that plaintiffs had standing to challenge the denial of equal protection based on considerations of race under this Court's decision in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Justice Hill would have affirmed the decision on other grounds. 11A-12A. Justice Jordan dissented, believing that once the state places the child in a foster home that this was tacit approval to such parents to be eligible as adoptive parents. Justice Jordan stated that once this relationship was shown to exist the burden would be on the agency to demonstrate changed conditions justifying the removal of the child. He believed that the Drummonds had shown the existence of a concept of

"psychological parents" and that this status should place upon the state the burden of changing the child's status.

> Here the record shows that the FCDFCS had approved the Drummonds as fit and proper foster parents for the care and protection of this child. This love, care and protection lasted some two and one-half years without complaint by the agency. During this period of time the foster parents became the psychological parents of the child, the only parents he had ever known. Upon their application to adopt, permission by the agency should have been given in the absence of a showing that they were no longer fit or eligible to become the adoptive parents. 13A.

Justice Jordan concluded that the foster parents had clearly established an interest in the child sufficient to entitle them to a judicial determination of their rights to adopt. Ibid.

Petitioners would also assert that Timmy had an interest in the relationship entitled to protection. The child had never known any other parents, to him his foster parents were "mommy and daddy." This relationship should not have been terminated because of agency views that he would be better

off in a black home and it should not have been terminated without full due process protection of hearings, representation, presentation of expert evidence, etcetera.

REASONS FOR GRANTING THE WRIT

I. Important Similar Issues Involving Due Process Rights Of Foster Children And Foster Parents Are Already Pending Before The Court.

Certiorari should be granted because this petition presents a question that is identical with, or similar to, issues pending before this Court in three other cases in which review has been granted, Rodriquez v. Organization of Foster Families for Equality and Reform, No. 76-5193, __ U.S. __, 45 U.S.L.W. 3320 (October 26, 1976); Shapiro v. Organization of Foster Families for Equality and Reform, No. 76-183; Smith v. Organization of Foster Families for Equality and Reform, No. 76-180, __ U.S. __, 45 U.S.L.W. 3272, (October 12, 1976). These cases involve due process rights of children placed in foster homes not to be separated from their foster parents without due process.

Decisions of this Court, including Board of Regents v. Roth, 408 U.S. 564 (1972), holding that the fourteenth amendment protects life, liberty, and property interests from deprivation by the state without due process,

Perry v. Sindermann, 408 U.S. 593 (196 1972), concluding that a justified expectation may give rise to an implied contract which may not be terminated without due process, Stanley v. Illinois, 405 U.S. 645 (1972), recognizing a right to family privacy, and the grant of review in Rodriquez, Shapiro and Smith, demonstrate the fundamental importance of the issue of due process rights of foster parents and foster-adoptive children presented in this petition.

While the underlying due process issues in Rodriquez, Shapiro and Smith and this case are similar, this case differs in that it presents the additional issue of whether it is permissible for the state to terminate foster parent care and deny its consent for adoption because of the race of the foster parents. Stated another way, the issue is whether the state may apply a racial presumption by deciding that Timmy, a child whose mother is Caucasian and father is believed to be black, should be adopted by a "black family to grow up in the black community"[1]

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[1] The staffing report refers to "legally black" children. This term arises out of Ga. Code §§79-103 and 53-312. Appended hereto at page 33A.

Petitioners asserted deprivation of their equal protection rights on the ground that they were not permitted to adopt Timmy because they are white; the decision to place Timmy in a black home necessarily excluded the Drummonds and all other white persons because of their race. The decision denied Timmy of equal protection of the laws in that he was made eligible for adoption only by black families.

II. Where Petitioners Alleged That Race Was Used As An Impermissible Factor In The Respondents' Decision To Remove The Child From The Drummonds' Home And Place Him Elsewhere For Adoption The Court Below Erred In Ruling That There Was No Standing To Raise The Denial Of Equal Protection Claim. This Holding Is In Clear Conflict With Prior Decisions Of This Court.

Quite apart from any rights of life, liberty or property protected by state law, petitioners asserted a right under the equal protection clause of the fourteenth amendment not to be discriminated against on the basis of race. The Supreme Court of Georgia essentially ignored the equal protection claim. After

reciting its reasons for holding that petitioners had no due process rights, it merely concluded that "the equal protection arguments must also fail for the same reasons. 6A.

This Court's decisions leave no room for the proposition that a state agency may discriminate on the basis of race provided that its actions do not infringe any other right of an individual. Even Board of Regents v. Roth, 408 U.S. 564 (1972), while reversing on the grounds that Roth had no due process rights, explicitly acknowledged that the state could not take rights which infringe his first amendment rights. Similarly, Bishop v. Wood, ___ U.S. ___, 96 S.Ct. 2074 (1976), limited its holding to cases in which there was no claim that the public employer's action was motivated by a desire to curtail or to penalize the exercise of a constitutional right.

III. Where Petitioners Assert That Their De Facto Custody Of Timmy Has Resulted In A Psychological Parent-Child Relationship, Such Custody Should Not Arbitrarily And Capriciously Be Changed; Such A Fundamental Relationship Should Not Be Terminated Without Due Process of Law Being Afforded To Both The Foster Child And The Foster Parents.

The concept of psychological parent-child relationships has received acceptance and is the subject of substantial advocacy by psychiatrists and child psychiatrists. The leading work in this area is Goldstein, Freud and Solnit, Beyond the Best Interest of the Child.[1]

The model custody act approved in 1963 by the American Bar Association, Family Law Section, provides is part as follows:

> Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody.

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[1] Testimony at trial elaborated extensively on this concept; witnesses were Elizabeth King, Ph.D., (child psychologist)(T. 234-45) and Jonas Robitscher, M.D., J.D. (psychiatrist-attorney)(T. 72-78).

State Courts are beginning to follow the medical profession in adoption of the psychological parent concept. See Katzoff v. Superior Court, 2 F.L.R. 2232 (Cal.Ct.App. Feb. 1976); In re: B.G., 11 Cal. 3d 679 (1974); In re: Confessora B., 348 N.Y.S. 2d 21 (1973).

When a state creates a situation which alters the lives of human beings, which encourages independent relations between a tiny infant and his foster parents over a period of time exceeding two and one-half years, and which leads to potential lasting emotional trauma to the individuals involved when that relationship is to be terminated, the contention that the young foster child and/or the foster parents have no standing to contest removal or no right to due process becomes a glaring inhumane constitutional deprivation. The psychological parent concept should be given recognition by this Court.

CONCLUSION

Petitioners, Robert George Drummond and Mildred Pauline Drummond, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on September 7, 1976.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Findings of Fact to be Entered of The Record and Petition For Writ of Certiorari To The Supreme Court of Georgia has been served upon counsel of record by depositing same in the United States Mails, postage prepaid.

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31316. DRUMMOND et al. v. FULTON COUNTY DEPARTMENT OF FAMILY & CHILDREN SERVICES et al.

UNDERCOFLER, Presiding Justice.

Timmy is a two and a half year old boy, who has been the foster child of the plaintiffs, the Drummonds, since he was one month old. He was placed in their home by the Fulton County Department of Family & Children Services (FCDFCS) after it received temporary custody by court order because the natural mother was unfit. In September, 1975, the natural mother's rights were terminated, legal custody was placed in FCDFCS, and Timmy became eligible for adoption. After their application was denied by the agency, the Drummonds filed this suit to enjoin Timmy's removal from their home and to force the FCDFCS to allow them to adopt Timmy. After the Drummonds' evidence was presented at the hearing on the interlocutory injunction, the FCDFCS moved to dismiss the complaint, and the motion was granted. The Drummonds appeal. We affirm.

1. The Drummonds' complaint seeking injunctive relief to prevent Timmy's removal was dismissed by the trial court as a matter of law. Enumerations 3, 6, 7, and 8 raise the question whether foster parents have any rights vis-a-vis their foster child, and thus standing to protest agency action on behalf of the child and to raise Fourteenth Amendment protections.

The Drummonds first argue that Code Ann. § 74-402, which states that "[a]ny adult person may petition for leave to adopt," supports their claim of standing to contest the agency's action. Although the Drummonds may have standing to bring an adoption petition in the sense that they are legally eligible to apply to the agency, they have no standing to contest the legal custodian's absolute discretion whether to give the consent requisite to a successful petition for adoption. See Division 5 of this opinion, infra. The contention that any such rights are conferred by this Code section is without merit.[1] We find *Duncan v. Harden*, 234 Ga. 204 (214 SE2d 890) (1975) inapposite as it deals with the revocation of consent by the natural parents. The mere statement of fact that the adoptive parents already chosen by the agency did not intervene in no way implies that all potential adoptive parents have any rights.

The Drummonds next urge that any application of the "best interests of the child" rule necessarily implies some de facto rights arising from the psychological dependency of a parent-child relationship which has been sustained over a period of time. Plaintiffs' expert witnesses testified to the trauma of separating a young child such as Timmy from the only parents he has ever known at an age when the separation could not adequately be understood or explained to him. See Alternatives to Parental Right in Child Custody Disputes Involving Third Parties, 73 Yale L. J. 15 (1963).

The best interest of the child test has been adopted in many jurisdictions. E.g., In re B. G., 11 Cal. 3d 679 (523 P2d 244) (1974); In re Confessora B., 348 N. Y. S. 2d 21 (1973); Halstead v. Halstead, 144 NW2d 861 (Iowa, 1966) (and cits.); Cummins v. Bird, 19 SW2d 959 (Ky., 1929). This rule contemplates a presumption that the best

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[1]Nor do we find any merit to the argument that Code Ann. § 24A-2001, providing for appointment of counsel where children not represented by a custodian are brought before a juvenile court in delinquency, unruliness or deprivation proceedings, implies that foster parents may have certain rights.

interests of the child lie with the natural parent, but that this presumption may be rebutted by clear and convincing evidence to the contrary. In re Confessora B., supra.

The Georgia law, however, has not followed this pattern. The best interests of the child test is used only between parents who both have equal right to the child. Code Ann. § 74-107; *Knox v. Knox*, 226 Ga. 619 (176 SE2d 712) (1970). Where the dispute is between a natural parent and a third party, on the other hand, the court must award the custody of the child to the parent unless he has lost his parental prerogatives under Code Ann. § 74-108 or is unfit. *Edwards v. Cason*, 237 Ga. 116; *White v. Bryan*, 236 Ga. 349 (223 SE2d 710) (1976); *Knox v. Knox*, supra; *Perkins v. Courson*, 219 Ga. 611 (135 SE2d 388) (1964). See generally Stubbs, A Summary of the Georgia Law of Children, Ch. 7 (1969).

The Drummonds (and amici, The Concerned Foster Parents of Metro Atlanta and Foster Parents in Action) misconstrue the Georgia law in assuming that the best interests of the child rule applies to foster parents. Without this test and its focus on the child, there is no basis for recognizing any right in the "psychological parents." Since the focus in determining whether a third party is entitled to custody is on the natural parents and whether or not they have forfeited their rights or are unfit (Code Ann. § 74-107; *Perkins v. Courson*, supra), any relationship between the child and his foster parents is primarily irrelevant. *Stuckey v. Jones*, 212 Ga. 495 (93 SE2d 719) (1956); *Watkins v. Terrell*, 196 Ga. 651 (27 SE2d 329) (1943).

In *Carson v. Marette*, 217 Ga. 614 (124 SE2d 74) (1962), in a similar situation where a foster parent sought to adopt a child whose legal custody had been placed in the juvenile court by written consent of the mother, the court placed the child in the plaintiff's foster home intending to allow the plaintiff to adopt it. When a neighbor complained that the plaintiff was treating the child cruelly, the juvenile court took the child back and placed it with the state agency. Plaintiff's habeas corpus petition was dismissed because she had no claim to the child. "The only custody that petitioner, Mrs. Carson, ever had of the child was that of custodial care under the order of the court

which could be revoked at any time." 217 Ga. at 615. We see no reason why the result should not be the same where the court has placed the legal custody in a state agency which also pays foster parents for the child's custodial care.

We thus find no merit in the Drummonds' claim of right by virtue of their status as Timmy's foster parents. The trial court did not err, as alleged in Enumeration 3, in denying any legal rights to foster parents who have cared for a child for more than two years and are his psychological parents.

Enumeration of error 7 urging that the trial court erred in holding that the Drummonds were not denied due process or equal protection under the Fourteenth Amendment must also fall under our holding that foster parents have no right to adopt a foster child and thus no right to contest the agency's withholding of consent. The Fourteenth Amendment protects life, liberty and property interests from undue interference by the state.[2] Board of Regents v. Roth, 408 U. S. 564 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U. S. at 577. The Drummonds allege several theories under which they claim entitlement to Fourteenth Amendment protections. We, however, find no merit to their contentions, and thus no standing to demand due process or equal protection of the laws.

The Drummonds' first argument that the right to adopt a child under Code Ann. § 74-402,[3] is a "protectable

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[2]The Fourteenth Amendment in pertinent part provides: "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[3]The only statutory requirements for adoption are that the person be at least twenty-five years old or married and living with his spouse, at least ten years older than the child, a resident of the state, and

interest" under the Fourteenth Amendment has already been considered and rejected above. They in fact were given the right to apply, they were interviewed and the application denied. As we have already noted, the agency's discretion as to which adoptive family will be chosen is absolute and the Drummonds have no rights beyond being considered. Furthermore, the United States Supreme Court has made clear that property interests are defined by state law. Board of Regents v. Roth, supra. The law of Georgia very clearly provides no rights in foster parents to adopt.

For the same reason, the Drummonds can not base their due process claim on a "right of family privacy." Since they have no right to keep Timmy, they can have no expectation of family privacy. Stanley v. Illinois, 405 U. S. 645 (1972) and other cases cited by the Drummonds are inapposite as the court in those cases was dealing with the rights of the biological parents.

The Drummonds next claim that the refusal by the adoption agency to allow them to adopt Timmy was based on erroneous information which they had no opportunity to contradict or correct and entitles them to due process. However, where there is no property interest to be protected, the Fourteenth Amendment does not "guarantee against incorrect or ill-advised [agency] decisions." Bishop v. Wood, — U. S. — (96 SC 2074, 48 LE2d 684, 693) (1976).

Nor do we find merit in the Drummonds' claim that they had a "justified expectation" or "implied contract" to adopt Timmy. See Board of Regents v. Roth, supra; Perry v. Sindermann, 408 U. S. 593 (1972); Sims v. Fox, 505 F2d 857 (5th Cir., 1974).

The Drummonds' allegation that the agency's refusal to allow them to adopt Timmy constitutes "a governmental attack on one's 'good name, reputation, honor, and community standing' " (Sims v. Fox, supra, p.

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financially able and morally fit to have the child. Code Ann. § 74-402. Of course, Code Ann. § 74-403 provides the conditions under which a child becomes available for adoption.

862; Wisconsin v. Constantineau, 400 U. S. 433 (1971)), and thus imposes due process obligations on the agency, is also without merit. Since the agency did not disclose this decision publicly, but merely communicated its decision orally at a meeting with the Drummonds, it cannot form the basis of a claim that the Drummonds' reputation in the community was impaired. Any other publicity "made in the course of a judicial proceeding which did not commence until after petitioner[s] had suffered the injury for which [they seek] redress . . . surely cannot provide retroactive support for [their] claim." Bishop v. Wood, supra, p. 692; Sims v. Fox, supra.

We thus find no basis for due process protections in favor of the Drummonds, and the equal protection arguments must also fail for the same reasons.

We decline to rule on the FCDFCS's assertions that res judicata and collateral estoppel bar relitigation of these constitutional issues. These claims arise from the fact that the Drummonds first brought a similar action against the FCDFCS in federal district court under 28 USC § 1983. When relief was denied there, the Drummonds instituted this suit in the Fulton County Superior Court. The FCDFCS has properly pleaded these affirmative defenses (Code Ann. § 81A-108 (c)); however, they must be properly proved by placing the entire certified record of the previous case in evidence. *Carr v. Car-Perk Services, Inc.*, 222 Ga. 793 (152 SE2d 692) (1966); *Smith v. Bank of Acworth*, 220 Ga. 626 (140 SE2d 889) (1965); *Glaze v. Bogle*, 105 Ga. 295 (31 SE 169) (1898). Since the Drummonds' case was dismissed before the FCDFCS had an opportunity to present its case, the certified record was not put in evidence, is not part of this record, was not considered by the trial court, and will not be considered here.

In conclusion, we hold that the Drummonds have no rights under the Fourteenth Amendment and thus no standing to contest the agency's action in refusing to consent to their adoption of Timmy. Their request for an injunction was correctly dismissed.

2. We also find no merit in Enumeration 8 claiming that the trial court erred in not holding that Timmy's constitutional rights were infringed since Timmy has no

right under the adoption statutes to choose his adoptive parents or consent to his adoption until the age of fourteen. Code Ann. § 74-403. Furthermore, he was not a party to this lawsuit.

3. In enumeration of error 14, the Drummonds claim a denial of due process by the FCDFCS because of its refusal to afford them a hearing under the Administrative Procedure Act, Code Ann. Ch. 3A-1. Code Ann. § 3A-114 provides that "In addition to any other requirements imposed by common law, Constitution, statutes or regulations: (1) In any *contested case,* all parties shall be afforded an opportunity for hearing after reasonable notice served personally or by mail." (Emphasis supplied.) The definition of "contested case" is contained in Code Ann. § 3A-102 (b): " 'Contested case' means a proceeding ... in which the legal rights, duties, or privileges of a party are *required by law to be determined by an agency after an opportunity for hearing.*" (Emphasis supplied.)

We have already reviewed in essence in Division 1, supra, the common law, Constitution, and statutes in order to determine if any rights accrued to the Drummonds by virtue of their status as Timmy's foster parents, and have found none. It is also clear from the record that the FCDFCS rules and regulations also do not afford any right in the foster parents to adopt a foster child in their care. The normal policy, which was not carried out in this case, is to ask potential foster parents to sign a statement acknowledging that the child will not be available for adoption by them. Foster parents are, however, eligible to apply to adopt foster children, in exceptional cases.[4] County Letter No. 323, State Department of Family and Children Services (Oct. 15, 1971). It thus appears that the agency, rather than recognizing any priority in foster parents as potential adoptive homes, discourages such adoptions.

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[4]"Foster boarding applicants are oriented from the beginning of the home study in a different way from adoptive applicants. The foster care plan is geared toward the temporary instead of the permanent. The home is not selected for the child with the idea that it will be a permanent home. Indeed, for most of the children in foster

Once, however, the foster parents and others have made known their wish to adopt a child, the agency is free to choose any or none of the applicants, according to its own policies. There is no opportunity for a hearing. Although each potential adoptive couple is interviewed, this functions as a fact finding mechanism rather than as an adversary proceeding or "hearing" in which evidence is presented. We, therefore, reiterate that the decision to choose adoptive parents for children in the custody of the FCDFCS is entirely discretionary in nature, the same as it would be for the natural parents in whose place the agency stands. Since there is thus no "contested case" within the meaning of the APA, the trial court did not err in failing to rule that such a procedure was necessary.

4. The Drummonds' enumeration of error four raises the question whether the trial court erred in dismissing their petition for adoption as fatally defective on the ground that the FCDFCS had not consented to the adoption. They allege that the consent was unreasonably withheld, thus unnecessary, and their petition should not have been dismissed.

Although the FCDFCS had only temporary custody

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care, adoption will not be the ultimate plan. The foster parent may be older than adoptive parents would ideally be or may have health problems which do not rule them out as temporary foster parents but would cause adoption to seem questionable. Foster parents are asked to sign a statement when they accept a child to the effect that this child is not available for adoption by them.

"For the above and other reasons, the development of a foster home into an adoptive home for a foster child in that home must definitely be considered an exception. However, this plan should not be overlooked as a possibility for certain children nor should it be considered an inferior plan. The foster home as an adoptive home is generally considered a resource for older children who have formed meaningful relationships with the foster family or for children with health problems or handicaps which the foster parents understand, accept and handle satisfactorily." County Letter No. 323, State DFCS (Oct. 15, 1971).

of Timmy when he was removed from his natural mother and placed with the Drummonds at one month old, the Department obtained his legal custody on September 25, 1975, when the natural mother's parental rights were terminated.[5] Only then was Timmy eligible for adoption. Code Ann. § 74-403 requires the consent of the agency before a child placed in its legal custody may be adopted.[6] Code Ann. § 24A-3204 (a), which provides for the placing of children with an agency upon termination of parental rights, also mandates that consent of the agency is necessary for adoption.[7]

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[5]"It is further ordered that legal custody of the said [Timmy] be placed with the Georgia Department of Human Resources, Division of Family & Children Services, and the said agency is granted the right to proceed with the adoption of said child. . ." Order, Fulton County Juvenile Court, September 25, 1975.

[6]§ 74-403. Consent of living parents or guardian. . . .

(1) Except as otherwise specified in the following subsections, no adoption shall be permitted except with the written consent of the living parents of a child . . .

(2) Exemption where child abandoned or parental custody terminated. . .

(4) Guardian.—If the child has a guardian of its person, the consent of such guardian shall be required, or if the child has been surrendered or *committed by court order to a licensed child-placing agency, the consent of such agency shall be required.*

[7]§ 24A-3204. Commitment to agency.

(a) If, upon entering an order terminating the parental rights of a parent, there is no parent having parental rights, the court shall commit the child to the custody of the Division of Children and Youth or a licensed child-placing agency, willing to accept custody for the purpose of placing the child for adoption, or in the absence thereof in a foster home or take other suitable measures for the care and welfare of the child. The custodian has authority to consent to the adoption of the child, his marriage, his enlistment in the armed forces of the United States and surgical and other medical treatment for the child.

The FCDFCS as legal custodian of Timmy stands in loco parentis and has all the legal rights of a natural parent, including the benefit of the prima facie right to custody. See *Porter v. Watkins*, 217 Ga. 73 (121 SE2d 120) (1961); *Parker v. Thomas County Dept. of Public Welfare*, 214 Ga. 701 (107 SE2d 178) (1959). As is clear from Code Ann. § 74-403, the agency also has the right to choose the adoptive parents of its wards by giving or refusing its consent to adopt.[8] Since the Drummonds did not have, nor claim to have this consent, the adoption petition was fatally defective, and subject to dismissal.

The Drummonds claim, however, that the consent of the FCDFCS was withheld unreasonably, was "arbitrary" and was "clearly an 'unwarranted exercise of discretion'." Since we have already held that the Drummonds have no right or standing to challenge the agency's action, the trial court properly dismissed this claim.

5. Enumerations of error 1, 2, 5, 9 and 12 need not be considered as they relate to procedural or evidentiary aspects of the case which are irrelevant since we here affirm the dismissal of the case as a matter of law for failure to state a claim for relief. We also hold that the trial court did not err in denying the Drummonds' motions for supersedeas, for new trial, or for reconsideration.

Both parties' motions to strike are denied.

Judgment affirmed. All the Justices concur, except Hill, J., who concurs specially, and Jordan, J., who dissents.

ARGUED JULY 13, 1976 — DECIDED SEPTEMBER 7, 1976.

Adoption, etc.; constitutional question. Fulton Superior Court. Before Judge Holt.

Margie Pitts Hames, Mary Ann Oakley, Barbara J. Bethune, for appellants.

Troutman, Sanders, Lockerman & Ashmore, Daniel

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[8]The Drummonds' reading of the statute whereby the agency's consent would not be required clearly misconstrues its language. See n. 7, supra.

S. Reinhardt, Robert L. Mote, Arthur K. Bolton, Attorney General, Lois Oakley, Assistant Attorney General, for appellees.

Lawrence L. Schneider, amicus curiae.

HILL, Justice, concurring specially.

Although I concur in the judgment of the court, I am unable to agree that because plaintiffs have not been denied life, liberty or property, they lack standing to urge equal protection arguments. The Fourteenth Amendment provides in pertinent part as follows: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Standing to assert a denial of equal protection does not require a deprivation of life, liberty or property, but requires only the denial to a person by the state of the equal protection of the law, which denial affects the person asserting the claim personally and differently from others similarly situated. In Moose Lodge No. 107 v. Irvis, 407 U. S. 163 (92 SC 1965, 32 LE2d 627) (1972), a guest was refused service in the dining room and bar of a private club licensed by the state to sell liquor. Although the state's licensing was found not to be sufficient state action to invoke the Fourteenth Amendment, the court found that the guest had standing to litigate the equal protection claim. The court did not predicate standing to make the equal protection argument on a deprivation of life, liberty or property.

The plaintiffs contend that the state considered race in its decision not to permit plaintiffs' adoption of Timmy. The Fulton County Department of Family & Children Services presented evidence that other factors such as age, health and psychology were considered. However, this issue had been adjudicated between these same parties in the United States District Court, where it was found that consideration of race, to the extent it contributed to the decision, was only such legitimate consideration as was necessarily required in determining the proper placement of Timmy, and was not a part of an automatic placement policy based solely on race. The plaintiffs' complaint in federal court was dismissed.

Drummond v. Fulton County Department of Family & Children Services, 408 FSupp. 382 (N. D. Ga. Jan. 30, 1976).

The court below had before it a certified copy of the district court's decision. The decision itself, even without the record, is sufficient to show the issue decided. See Pye v. Department of Transportation of State of Ga., 513 F2d 290 (5th Cir. 1975). Cf. *Ferguson v. Caldwell,* 233 Ga. 887 (213 SE2d 855) (1975). Although the district court did not decide the state law questions, it did decide this Fourteenth Amendment issue. The district court had jurisdiction to decide that issue. Because the judgment of that court has not been reversed or set aside, that judgment is conclusive as between the parties here. Code Ann. § 110-501. Therefore, the court below committed no error in dismissing plaintiff's claim of denial of equal protection of the laws.

JORDAN, Justice, dissenting.

I do not agree with the holding in the majority opinion that the "relationship between the child and his foster parents is primarily irrelevant" and the conclusion that "we thus find no merit in the Drummonds' claim of right by virtue of their status as Timmy's foster parents."

The facts in *Carson v. Marette,* 217 Ga. 614 (124 SE2d 74) (1962), cited in the majority opinion, which denied the claim of the foster parent, are vastly different from the facts in this case. In *Carson* the custody of the foster parent had been revoked by the juvenile court based on a complaint filed in that court alleging abuse and mistreatment of the child by the foster parent. Certainly this was sufficient to eliminate any legal claim or right the foster parent might have had. In the case under consideration the facts show love and care for the child and no court has ever revoked the custodial care given to the foster parents at the time the child was placed in their home.

It is my position that when a state agency having only legal custodial status places a child in a foster home, tacit approval is given that such foster parents are eligible to be adoptive parents. Once this relationship is shown to exist the burden should be upon the agency to

show that conditions have changed adversely affecting the welfare of the child, such as was done in *Carson,* supra. Unless such changed conditions are shown to exist, the agency no longer has the absolute and arbitrary discretion to refuse such application to adopt.

Here the record shows that the FCDFCS had approved the Drummonds as fit and proper foster parents for the care and protection of this child. This love, care and protection lasted some 2-1/2 years without complaint by the agency. During this period of time the foster parents became the psychological parents of the child, the only parents he had ever known. Upon their application to adopt, permission by the agency should have been given in the absence of a showing that they were no longer fit or eligible to become the adoptive parents.

This is not a dispute between the natural parent(s) of a child and some third party, as was the situation in several cases cited by the majority. This dispute is between foster parents who in time have become psychological parents and a state agency whose only interest should be that the "best interest of the child" test has been met. The initial determination of this test was made by the agency when it placed custodial care of the child in the Drummonds at the age of one month. This "best interest of the child" determination is presumed to continue until the contrary appears. This record is devoid of facts to show such a change. The Drummonds' application to adopt was simply "denied."

Georgia should follow the lead of several states which have recognized that legal rights can attach to foster parents under certain conditions. See In re Confessora B., 348 N. Y. S. 2d 21 (1973). Under the facts of this case the foster parents had clearly established an interest in the child sufficient to entitle them to a judicial determination of their right to adopt.

In my opinion the trial court erred in dismissing the complaint for failure to state a claim.

I respectfully dissent.

IN THE SUPERIOR COURT
FOR THE COUNTY OF FULTON
STATE OF GEORGIA

ROBERT GRACE DRUMMOND and MILDRED PAULINE DRUMMOND,

Plaintiffs,

vs.

FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES; DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF GEORGIA, DIVISION OF FAMILY AND CHILDREN'S SERVICES,

Defendants.

CIVIL ACTION

FILE NO. C-14669

FINDINGS OF FACT TO BE ENTERED OF RECORD

CONCLUSIONS OF LAW

The Court finds that defendant Department of Human Resources of the State of Georgia, Division of Family and Children's Services is the legal custodian of said child by virtue of an order of Fulton County Juvenile Court, dated September 25, 1975, with the right to proceed with the adoption of said child.

The Court finds further that by the same order of the said court, temporary custody of said child was vested in the defendant Fulton County Department of Family and Children's Services pending placement for adoption by the Department of Human Resources of the State of Georgia, Division of Family and Children's Services.

The Court finds that foster parents under the laws of Georgia have no rights independently granted by law, either to custody of a foster child or to adopt a foster child placed in their foster care.

The Court finds that plaintiffs have not acquired and do not have the statutorily required consent of the legal custodian to proceed with the adoption of said child; the petition for adoption as set up by amendment to the original complaint is fatally defective and must be dismissed as failing to set forth a cause upon which the relief sought may be granted.

The Court further finds that the plaintiffs have failed to present sufficient evidence to show that defendants have acted capriciously, arbitrarily and in abuse of their discretion in refusing consent to the adoption of said child by plaintiffs. The defendants acted reasonably in the exercise of such discretion.

The Court further finds that the defendants used no impermissible standards in consideration of the plaintiffs' request to adopt said child, nor in arriving at its decision to deny such request.

The Court further finds no denial of due process of law and no denial of equal protection of law nor of any other rights guaranteed to plaintiffs or the child under the Constitution of the United States or of the State of Georgia.

O R D E R

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the relief sought by plaintiffs in their complaint, as amended, be and the same hereby is denied, and the said complaint, as amended, be and the same hereby is dismissed.

IT IS FURTHER ORDERED that the said child (Timothy Lee Hill) be and he hereby is remanded to the custody of the defendants for the purpose of the execution of the aforesaid Order of the Juvenile Court of Fulton County, dated September 25, 1975.

This March 19, 1976.

/s/ Elbert Hill

JUDGE, SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

IN THE SUPERIOR COURT
OF FULTON COUNTY
STATE OF GEORGIA

ROBERT GRACE DRUMMOND and MILDRED PAULINE DRUMMOND,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO. C-14669
FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES, et al.,	)	
Defendants.	)	

FINDINGS OF FACT

1.

On November 16, 1973, a male baby was born to a white mother. The race of the father at the time was unknown. The child has been called Timmy.

2.

In early December of 1973, the defendants, Fulton County Department of Family and Children Services and the Department of Human Resources of the State of Georgia, Division of Family and Children Services, took custody of Timmy pursuant to appropriate legal procedure. Custody was taken because it was believed that the mother at that time was unable to provide adequate care for the child.

3.

On December 14, 1973, Timmy was placed in foster care with the plaintiffs in this action, Robert and Pauline Drummond.

4.

The Drummonds had been approved as a foster care family for infants under the auspices of the Fulton County Department of Family and Children Services; there had been one placement in the Drummond home prior to Timmy. The previous foster child was in the Drummond home for a period of three months preceding December of 1973.

5.

Foster care is a temporary program in which foster parents accept the possession and care of a child which is in the legal custody of the appropriate state agency and foster parents agree to provide a temporary living arrangement for that child, with subsidies to be provided by the State. Foster families are given no rights with regard to foster children placed in their care.

6.

The temporary nature of foster care was explained to the Drummonds at the time they applied to be foster parents.

7.

The foster child Timmy stayed with the Drummonds from December 14, 1973, and was still with the Drummonds at the time of this hearing.

8.

Apparently, the Drummonds intermittently expressed interest in adopting Timmy if he were free for adoption.

9.

In response to these intermittent requests, the Drummonds were told, as they had been previously, that there was an age policy which was an important factor in considering their request to adopt Timmy, but that they would be eligible to adopt a child from five to nine years of age. Also, at least until September of 1975, the Drummonds were told that since the defendants did not have adoptive rights to Timmy, no decision could be made on adoption.

10.

In March of 1975, the Drummonds had a meeting with representatives of the defendants to discuss continued foster care and possible adoption of Timmy. At that time, it was explained to the Drummonds that adoptive rights had not yet been obtained for Timmy but that when they were, the defendants would probably be looking for adoptive couples other than the Drummonds. The reasons

for that decision were explained to the Drummonds at the time. The Drummonds were asked if they could continue to provide a loving foster home for Timmy and let Timmy go when the time came for adoption. The Drummonds said that they could.

11.

In approximately August of 1975, during a routine annual foster home re-evaluation, Barbara Osgood, a social worker with the Fulton County Department of Family and Children Services, was told by the Drummonds that they had renewed their interest in adopting Timmy.

12.

Barbara Osgood reported that request to her superiors who informed Barbara Osgood that the Drummonds' request would be considered.

13.

On September 25, 1975, adoptive rights were obtained on the child, Timmy. On that date, Judge Tom Dillon of the Fulton County Juvenile Court entered an Order terminating the parental rights of Timmy's natural parents and placing permanent legal custody and guardianship of Timmy with the Department of Human Resources of the State of Georgia, Division of Family and Children Services.

14.

On October 4, 1975, the Drummonds were given a formal evaluation interview in connection with their request to adopt Timmy. Brenda Payne interviewed the Drummonds and prepared a lengthy report summarizing that interview.

15.

Also in October of 1975, Kaye Dallinger, of the Fulton County Department of Family and Children Services, requested appropriate state authorities to ascertain whether there were any available adoptive applicants to be evaluated for possible placement of Timmy. It should be noted that Brenda Payne, in her interview evaluation report, recommended that the Drummonds be allowed to adopt Timmy, but in making that recommendation stated that she knew of no alternative adoption resource for the child.

16.

On November 21, 1975, approximately 18 agents or employees of the defendants met to formally decide upon the Drummonds' request to adopt Timmy.

17.

The meeting was unusual, both in the large number of people present and in the fact that only the Drummonds' request was being considered at that time. Normally, fewer people are involved and more

than one adoptive applicant is considered. However, it was stated that the defendants wanted to give priority consideration to the Drummonds because they had been foster parents for such a long period of time.

18.

The consensus of the committee on November 21, 1975 was to deny the Drummonds' request. The committee met for over three hours, reviewed all of the records kept on Timmy and the Drummonds since Timmy was placed with the Drummonds, and discussed freely the questions raised. A vote was taken at the end and only one person voted in favor of leaving Timmy with the Drummonds.

19.

Among the reasons on which the decision was based are the following:

(a) Age: Mr. Drummond was 39 and Mrs. Drummond was 51 at the time of consideration of their request. The state and county agencies had policies regarding appropriate ages of adoptive couples. As part of this policy, the defendants opposed placing infants with adoptive couples who were more than 36 years older than the infant. There is a similar age policy on the national level and also among most English-speaking countries.

(b) Health: The Drummonds had once before asked the defendants to remove Timmy from their home on the advice of

their physician and family friend, Dr. George Lucas. Apparently, the Drummonds had visited Dr. Lucas at a time when Mrs. Drummond was fatigued and anxious and Dr. Lucas recommended that she give up the child. Also, the two pediatricians who care for Timmy, Drs. Louis and Virginia Reynaud, had advised the defendants that Timmy was physically too much for Mrs. Drummond to handle. They advised the defendants that Mrs. Drummond fatigued easily and cried frequently during Timmy's visits with the pediatricians. The defendants felt, regardless of whether Mrs. Drummond were suffering from any specific physical disability, that Mrs. Drummond was not capable of coping with the day-to-day rigors of a healthy, active child of Timmy's age, especially as he grows older.

(c) The community in which the Drummonds were living at the time was also considered. The Drummonds were living in a predominantly white community, in a white neighborhood, where the school was white, and only two day care centers in the entire county had signed the Civil Rights Compliance Act. It was believed that Timmy's natural father was black. No definitive evidence was ever elicited on this, but the child appeared to be mixed race at the time of consideration and was generally considered to be such by all involved.

(d) Parenting abilities: The general consensus of those at the meeting was that the Drummonds had given good care to Timmy up until that point but there was a good deal of discussion and concern as to whether the Drummonds would

e able to continue to meet Timmy's needs as he grows older.

(e) Intellectual environment: Timmy was known to be an exceptionally bright child. Mrs. Drummond had completed ninth grade and Mr. Drummond completed high school through GED. It was doubted by the group that the defendants would be able to provide the stimulation and opportunities that Timmy would need in the future.

(f) Race: As was indicated, Timmy was, and is, considered mixed race, black and white. The Drummonds are white. There was evidence that these defendants do place mixed race children with white families. However, the evidence showed that these defendants are very careful in their selection of the appropriate white families with which to place mixed race children, and there are specific desirable characteristics. Generally, it was concluded by the defendants that the Drummonds did not have these characteristics and it was felt that the Drummonds would be unable to cope with Timmy's needs.

(g) Separation: During the hearings on plaintiffs' motion for a preliminary injunction, the plaintiffs presented evidence that separating Timmy from the Drummonds at that point in time could create developmental problems for the child in the long run. This evidence was elicited from a psychologist

and a child psychiatrist. During their November 21, 1975 meeting, defendants weighed the potential problems created by separation against the potential problems created by allowing the plaintiffs to adopt Timmy.

20.

On November 26, 1975, the Drummonds met with agents of the defendants and were informed of the decision not to allow them to adopt Timmy and the basis for that decision.

21.

The defendants acknowledged that the Drummonds loved Timmy and wanted Timmy and that separation may create some problems but concluded that there was sufficient justification for denying the request of the Drummonds.

22.

In the meantime, the defendants had located an alternative adoption resource for Timmy. The plans were to place Timmy with a young, better-educated, professional, black couple.

23.

The Drummonds decided to fight the decision and hired attorneys to assist them in that fight.

24.

After attempts to negotiate and requests for rehearings from the defendants, the Drummonds filed suit in the United States District Court for the Northern District of Georgia on January 14, 1976, after a request for an administrative hearing had been denied by the defendants, alleging that defendants' actions were discriminatory and a violation of the laws of the State of Georgia and the United States and requesting injunctive relief. After hearing all of plaintiffs' evidence, Judge Charles Moye issued an Order on January 30, 1976 dismissing plaintiffs' complaint and stating that there was no evidence that defendants had unlawfully discriminated against the Drummonds. Judge Moye also held that race was a permissible criterion and was so used by the defendants in their decision not to place Timmy for adoption with the plaintiffs.

25.

On January 23, 1976, plaintiffs filed the instant complaint in the Superior Court of Fulton County and obtained a temporary restraining order from Judge Charles Wofford of the Superior Court of Fulton County restraining the defendants from removing the child Timmy from the plaintiffs' home pending a hearing on plaintiffs' request for a preliminary injunction.

26.

By amendment to their complaint, plaintiffs filed an adoption petition for the child, Timmy. Plaintiffs did not allege, nor could they, that they had obtained the consent of defendants to adopt Timmy. Defendants withheld and still withhold such consent.

27.

Prior to the hearing on the preliminary injunction, the defendants answered and filed a Motion for a Preliminary Determination of the Defenses contained in their Answer. This motion was again made to the Court at the start of the hearing on plaintiffs' motion for a preliminary injunction.

28.

At the close of plaintiffs' evidence, defendants renewed their Motion for a Preliminary Determination of Defenses and also moved to dismiss plaintiffs' complaint on the ground that the complaint did not set forth sufficient grounds upon which the relief sought could be granted.

O R D E R

The within and foregoing Findings of Fact are ordered filed as a part of the record in the above-stated case.

This March 31, 1976.

/s/ Edwin Holt
JUDGE, SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

IN THE SUPERIOR COURT
FOR THE COUNTY OF FULTON
STATE OF GEORGIA

ROBERT GEORGE DRUMMOND and MILDRED PAULINE DRUMMOND, Plaintiffs,	)	
vs.	)	CIVIL ACTION
FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES, DEPARTMENT OF HUMAN RESOURSES, OF THE STATE OF GEORGIA, DIVISION OF FAMILY AND CHILDREN SERVICES, Defendants.	)	FILE NO. C-14669

ORDER

Plaintiff's Motion to Reconsider and for a New Trial having been considered, a hearing having been had, all parties having been heard, and all pleadings directed to the Motion having been reviewed, and it appearing to the Court that the grounds allegedly justifying the Motion to Reconsider and for a New Trial are without merit, it is hereby ordered, judged, and

decreed that plaintiffs' Motion to Reconsider and for a New Trial is denied on each and every ground thereof.

This 5th day of April, 1976.

/s/ Elmo Holt

JUDGE Elmo Holt
SUPERIOR COURT of
FULTON COUNTY

IN THE SUPERIOR COURT
FOR THE COUNTY OF FULTON
STATE OF GEORGIA

ROBERT GRACE DRUMMOND and MILDRED PAULINE DRUMMOND,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO. C-14669
FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES, et al.,	)	
Defendants.	)	

ORDER ON REQUEST FOR
SUPERSEDEAS OR STAY ORDER

The Court having heretofore disposed of plaintiffs' Motion to Reconsider and For a New Trial and plaintiffs' Motion for Continuance by appropriate orders, and

There now remains to be disposed of plaintiffs' Request for Supersedeas or Stay Order.

All the evidence presented throughout the entire proceeding having been considered in connection herewith, the Court finds that plaintiffs will suffer

no irreparable injury upon the Court's failure to grant a Supersedeas or Stay Order, and

After hearing arguments of counsel and consideration thereof, together with briefs submitted,

IT IS CONSIDERED, ORDERED AND ADJUDGED that plaintiff's Request for Supersedeas or Stay Order be and the same hereby is denied.

IT IS FURTHER ORDERED that no adoption of the child named in these proceedings be finalized until the Supreme Court of Georgia renders its judgment on the issues raised in the Notice of Appeal, filed by plaintiffs on April 6, 1976, in order that the rights of the parties, if any, be preserved and protected, provided plaintiffs proceed expeditiously with said appeal without any delay.

This April 7, 1976.

/s/ Ethno Hall
JUDGE, SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

79-103 (2177) Persons of color, who are All Negroes, Mulattoes, mestizos, and their descendants, having any ascertainable trace of either Negro or African, West Indian, or Asiatic Indian blood in their veins, and all descendants of any person having either Negro or African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color.
(Acts 1865-6, p. 239; 1927, p. 272.)

53-312 "White person" defined
The term "white person" shall include only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person, any one of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a colored person or person of color, shall be deemed to be a white person.
(Acts 1927, pp. 272, 277.)